United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1238

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

United States of America,

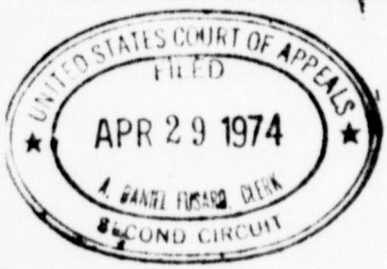
Plaintiff-Respondent,

-against-

Stanton Freeman,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT



Myron Beldock
Kathleen Wresien
of Counsel.

Beldock Levine & Hoffman
Attorneys for Defendant-Appellant
565 Fifth Avenue
New York, New York 10017
212-490-0400

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

" "

UNITED STATES OF AMERICA, "

Plaintiff-Respondent, "

-against- "

STANTON FREEMAN, "

Defendant-Appellant. "

" "

REPLY BRIEF FOR DEFENDANT-APPELLANT

POINT

(Reply to Appellee's Point I and further to Appellant's Points I and II)

THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO RAISE A JURY QUESTION OR TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT.

The government's brief labors under a major misconception. Freeman has not contended that his acts after June 13 are inadmissible because they are post-conspiracy acts; but rather that they are irrelevant to proof of his involvement in the conspiracy during its pendency. The cases cited in the government's brief are not applicable to Appellant's contention. In all those cases, there was ample evidence of the conspirators' involvement during the pendency of the conspiracy; and that evidence, coupled with the post-conspiracy acts revealing the intent of the particular conspirator or his participation in the charged

conspiracy, was held sufficient evidence of guilt.

Thus, in Lutwak v. United States, 344 U.S. 604 (1953), there was no issue as to whether any charged conspirator was married to an alien and that the alien had thus obtained entry into the United States. The Court determined that the conspiracy ended on the date of the last alien entry, following Krulewitch v. United States, 336 U. S. 440 (1949); but that the post-conspiracy acts were nonetheless admissible, as they went to the fact of the conspiracy - whether these marriages were sham and entry therefore illegal - and were relevant to prove that fact and to show the intent of the parties in going through the ceremonies. In United States v. Bennett, 409 F.2d 888, 892 (2d Cir.), cert. denied, 396 U. S. 852 (1969), there was not even an issue of the sufficiency of the evidence as the "record fairly shrieks of guilt." The post-conspiracy act was that of importing heroin which may or may not have been within the original conspiratorial plan. The Court found it relevant and admissible on either of two theories: first, that from it one could infer prior experience or instruction by co-conspirators; or, second, that the act was typical of the broad conspiracy itself and was therefore within the understanding of the particular conspirator as to his individual role. In United States v. Nathan, 476 F.2d 456, 459-460 (2d Cir. 1973), the acts were further drug transactions and the exchange of large sums of money - acts paralleling the acts of the drug conspiracy, and probative of the existence of the conspiracy or the participation

of the alleged conspirator. Finally, in United States v. Costello, 352 F.2d 848, 853-854 (2d Cir. 1965), further gambling transactions showed the existence and aim of the conspiracy which involved gambling.

In all the above cases, the post-conspiracy acts went to the heart of the conspiratorial aim and were relevant to show the actor's participation in the conspiracy to commit the substantive crimes; and were supplementary to other evidence of the conspirators' involvement during the pendency of the conspiracy. The acts of Freeman after June 13, 1973,* do not go to the fact of the conspiracy - drug importation and distribution; and could not show Freeman's intent or participation in the conspiracy as there was no evidence whatsoever of involvement prior to June 13. There is nothing in Freeman's acts or declaration after June 13, 1973, which reveal involvement before that date; or from which one can even remotely infer involvement before that date. There is nothing in the evidence presented of the occurrences between May 15** and June 13 which involve either Freeman or someone fitting Freeman's description. There was nothing to indicate that Freeman was an intended recipient for drugs in this conspiracy or that the drugs were to go to more than one distributor.

---

* Date the cocaine was seized by the government.

** Date Rudge first conceived of the idea he might smuggle cocaine.

What is present is a conspiracy which ended on June 13, 1973, with the seizure of the drugs at Kennedy Airport. The acts after that day can only be characterized as acts of concealment. Krulewitch, supra and Grunewald v. United States, 353 U. S. 391 (1957) teach that such acts may not be used to extend the termination date of the conspiracy unless proven part of the original conspiracy. Lutwak v. United States, supra, and United States v. Hickey, 360 F.2d 127 (7th Cir. 1966) teach that this termination date is not solely used to preclude extension of the statute of limitations and to suppress post-conspiratorial statements; but to preclude the government's self-serving use of such concealing acts to extend any conspiracy past its actual termination date. With the conspiracy ending on June 13, 1973, any acts occurring after that date would only be relevant to prove the guilt of someone involved in the conspiracy before that date. Otherwise, the acts after the conspiracy - being acts of concealment - can only be proof of a conspiracy to conceal. To infer further from these acts, would be to impermissibly infer from remote evidence the fact to be proven.

The government also accuses Appellant of dissecting evidence, in attacking the Court's reasoning and basis of decision. Yet, to look at the evidence as a whole is to see its gaping void - that there is no reference to, or thought of, Freeman between May 15 and June 13. There is certainly no evidence of any act by Freeman - or, for that matter, George Morao - which in any way showed an interest in the conspiracy's success or gave him a stake in its outcome. United States v. Cassino,

467 F.2d 610, 617 (2d Cir. 1972), cert. denied, 410 U. S. 928 (1973). The findings of fact of the Court below gloss this gap by creating a Freeman-Morao continuous cocaine business and thus making Freeman a participant in the conspiracy from its inception. But no repeated sizeable transactions were shown to allow the finding of Freeman's participation in a conspiracy involving an importation of five pounds of cocaine or of any cocaine. Evidence was dissected in Appellant's brief to show that this gap was present; and that there was no reasonable basis in the facts for the conclusion that Freeman was a part of the conspiracy; and that the Judge's findings were clearly erroneous.

Moreover, the Court itself, during the pendency of the trial, specifically ruled that only cocaine transactions which occurred within six months prior to the conspiracy should be considered (see Appellant's Brief, p. 37). The basis for this legal ruling is obvious - that if the transactions shown were remote in time they should not be considered relevant to the charged conspiracy. Yet, in its decision the Court made findings directly contrary to its ruling. The Court of necessity, in finding the existence of Freeman's involvement with Morao in a "cocaine business," had to go beyond the limits of its legal ruling as there was no proof of any drug transaction by Freeman in this six month period.

Freeman bought and resold very small quantities of cocaine from Morao in 1972. He did certain acts to help Morao, and incidentally, Rudner, after June 13, 1973. But without some

proof to connect Freeman with the conspiracy and its aims between May 15 and June 13, these acts are not probative of his involvement. He may be condemned for his earlier use and sales of drugs and for his continued social association with Morao; he cannot be convicted of conspiracy to import and distribute cocaine without proof of his involvement in such a conspiracy.

Respectfully submitted,

BELDOCK LEVINE & HOFFMAN
565 Fifth Avenue
New York, New York 10017
(212) 490-0400

On the Brief:
MYRON BELDOCK
KATHLEEN WRESIEN

Copy Received - April 29, 1974

Hon. Edward J. Boyd, United States Attorney

By Bernard J. Fried, AUSA by MB
Bernard J. Fried, AUSA